

Cohen v Anatole

2022 NY Slip Op 33952(U)

November 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 506652/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of November 2022

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
DOROTHY COHEN, as Administrator
of the Estate of Samuel Fishkowitz,
deceased,

Index No.: 506652/2021

Plaintiff,

-against-

DECISION AND ORDER

BERL ANATOLE,

Defendant.

-----X
The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Affirmation in Support/Exhibits Annexed

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In this matter, plaintiff, Dorothy Cohen, as Administrator of the Estate of Samuel Fishkowitz, deceased, moves by Notice of Motion (Motion Sequence 4) pursuant to CPLR § 2308 for an order punishing nonparty, Yasodra Seenarine, for failing to appear for a deposition in response to Judicial Subpoena Duces Tecum issued by plaintiff's attorney, Mark J. Fox, Esq. of the Law Offices of Mark J. Fox.

Plaintiff commenced this matter by the filing of a Summons and Verified Complaint on March 19, 2021 to set aside an alleged fraudulent real estate deed that was recorded against decedent, Samuel Fishkowitz's, property known as 1024 East 57th Street, Brooklyn, New York 11234 (Block 7804, Lot 53). In the Verified Complaint,

Motion #4

plaintiff asserts that the decedent, who was the sole owner of the subject property, died on July 22, 2019 and thereafter, on March 5, 2020, defendant, Berl Anatole, caused a forged deed of conveyance, dated April 23, 2019, to be recorded and filed against the premises in the Office of the City Register of the City of New York under Register File Number 2020000085250. Plaintiff claims that the signature on the deed is not that of the decedents and thus, requests that such deed be declared as void, illegal and of no effect. Plaintiff further requests, inter alia, that such fraudulent deed is discharged and cancelled of record.

In support of the instant motion, plaintiff's attorney contends that the fraudulent deed and the smoke detector affidavit, dated March 3, 2020, contains the notary stamp of nonparty, Yasodra Seenarine. Plaintiff's attorney explains that the deed and smoke detector affidavit indicate that Ms. Seenarine witnessed the decedent endorse both documents, although the smoke detector affidavit was executed several months after the decedent's death.

Plaintiff's attorney contends it is essential that Ms. Seenarine be deposed to explain how her notary stamp and signature appear on the aforementioned real property transfer documents and deed. Plaintiff's attorney further contends that Ms. Seenarine should be punished for contempt of court for failing to comply with the judicial subpoena that he caused to be served upon Ms. Seenarine on November 22, 2021. Plaintiff's attorney submitted an affidavit of service from his process server, Andrew Rothberg, who attests that he delivered the judicial subpoena to a person of suitable age and discretion at 20 Locust Street, Long Beach, New York 11561.

A review of the subpoena reveals that plaintiff's attorney commanded Yasodra Seenarine to appear for a deposition on January 7, 2022 at 10:00 a.m. at the Law Offices of Mark J. Fox, at 1407 Broadway, 40th Floor, New York, New York. Plaintiff's attorney also commanded Yasodra Seenarine to bring with her all records in her possession that pertain to the affixing of her notary stamp and signature to the disputed deed and real property transfer documents. The subpoena also notified Ms. Seenarine that failure to comply is punishable by contempt of court and a penalty of not more than fifty dollars.

Plaintiff's attorney affirms that Yasodra Seenarine failed to appear on the day in question and submitted the default in appearance transcript to corroborate that assertion. Plaintiff's attorney explains that Ms. Seenarine's appearance was next requested in a Notice to Take Deposition that was mailed to Ms. Seenarine on or about February 6, 2022. In that document, plaintiff's attorney notified Ms. Seenarine that she was scheduled to appear at his office for an examination under oath on March 8, 2022 at 10:00 a.m. Plaintiff's attorney affirms that Ms. Seenarine also failed to appear in response to that notice.

The subpoena issued by plaintiff's attorney, as an officer of the court, is a judicial subpoena within contemplation of CPLR § 2308(a) (*see Wenig Saltiel, LLP v Bozeman*, 76 Misc3d 135(A) [App Term 2d Dept, 11 & 13 Jud Dists 2022] *citing Douglas Elliman, LLC v TWP Real Estate, LLC*, 189 AD3d 614 [1st Dept 2020]; *see also* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2308, C2308:1 [Section 2308 embraces subpoenas issued by attorneys at any stage of a judicial proceeding, regardless of whether the subpoena was specifically returnable in court]).

Plaintiff has demonstrated that the subpoena served upon Ms. Seenarine clearly expressed a mandate to appear for a deposition, also known as an examination under oath, and to bring with her documents that pertain to the conveyance and deed transfer of the decedent's property. Plaintiff also demonstrated her interest in deposing Ms. Seenarine, based upon the assertions in the Verified Complaint and the documents submitted in support of the instant motion.

After careful consideration, the court finds that nonparty, Yasodra Seenarine, disobeyed plaintiff's attorney's lawful mandate that she appear to be examined under oath. Such disobedience, regardless of Ms. Seenarine's motive, may have defeated, impaired, impeded or prejudiced plaintiff's rights to prosecute the claims in her Verified Complaint. Ms. Seenarine also failed to appear on the return date of the instant motion, submit written opposition, or move to quash the judicial subpoena. Thus, the court finds that nonparty Yasodra Seenarine is guilty of contempt of court for failure to comply with the Judicial Subpoena Duces Tecum issued by plaintiff's attorney in connection with this action.

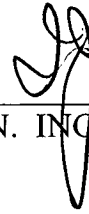
Accordingly, it is hereby

ORDERED, that plaintiff's motion (Motion Seq. 4) is granted, on default, to the extent that nonparty, Yasodra Seenarine, shall purge herself of the contempt by complying with the Judicial Subpoena Duces Tecum previously served upon her within twenty (20) days of receiving a copy of this order with Notice of Entry, together with a copy of the original judicial subpoena and correspondence from plaintiff's counsel providing the documents Yasodra Seenarine is required to bring and the specific location, day and time that such deposition/examination under oath will take place, and it is further

ORDERED, that upon plaintiff's counsel's filing of an affidavit of non-compliance, the court shall punish Yasodra Seenarine in accordance the provisions outlined in CPLR § 2308.

This constitutes the decision and order of the court.

ENTER



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice